Nurul Iman bt Abu Mansor v Gleneagles Hospital Kuala Lumpur Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-457–08 OF 2022
SUZANA MUHAMAD SAID JC
23 SEPTEMBER 2024

Tort — Negligence — Medical negligence — Breach of non-delegable duty of care — Plaintiff's right median nerve injured during operation conducted by surgeon practicing at private hospital — Plaintiff sued private hospital for breach of non-delegable duty of care — Whether elements of negligence proven — Whether private hospital vicariously liable for negligence of its surgeon — Whether private hospital and surgeon had breached their duty of care/standard of care including breach of non-delegable duty of care — Whether such breach had caused damage and injuries to plaintiff — Whether private hospital could claim indemnity from surgeon — Whether plaintiff entitled to recover damages from private hospital — Evidence Act 1950 ss 101 & 102

The plaintiff had filed an action against the first defendant, a private hospital ('D1') for breach of non-delegable duty of care and contended that D1 was vicariously liable for the negligence of the second defendant, a Consultant Orthopaedic and Trauma Surgeon practicing at D1 ('D2'), who had negligently injured the plaintiff's right median nerve during an operation and had delayed in providing necessary surgical and medical treatment to treat the complications of the median nerve injury. In support of her case, the plaintiff relied on the evidence of Prof Dr Jamari, a hand and micro surgeon at Universiti Kebangsaan Malaysia Specialist Centre, who testified that part of the nerve was cut. The plaintiff claimed general damages, special damages, interest and costs in respect of the injuries and losses suffered. Following the plaintiff's action, D1 had filed a notice for contribution and indemnity ('encl 9') against D2 in the event the court found that D1 was liable as a result of D2's negligence. The issues arose in the present case were whether the defendants had breached their duty of care/standard of care including breach of non-delegable duty of care and whether such breach had caused damage and injuries as alleged by the plaintiff.

Held, allowing the plaintiff's claim and dismissing encl 9 with cost:

(1) It was trite that the onus lay on the plaintiff to prove the elements of negligence in order to succeed in her claim against the defendants pursuant to ss 101 and 102 of the Evidence Act 1950. In a claim for tort of negligence, the plaintiff must prove that the defendants owed a duty of

care, that duty was breached and caused damage to the plaintiff. Thus, the burden lay on the plaintiff to prove on balance of probabilities, that the defendants or any of the defendants had committed the act of negligence. It must also be proven by the plaintiff the causation link between the act of negligence and the injuries suffered by the plaintiff (see paras 32–33 & 35).

(2) Regarding the non-delegable duty of care of a person providing services, whether as an employer or otherwise, the court in *Woodland v Essex County Council* [2014] 1 All ER 482 had provided five defining features. In the present suit, the court found that the said five defining features were fulfilled as followed: (a) the first factor — the plaintiff was receiving treatment, as such, the plaintiff was a patient; (b) the second factor — there was an antecedent relationship between the plaintiff and D1; (c) the third factor and the fourth factor — the plaintiff had no control over how D1 chose to perform its obligations, whether personally or through employees or third parties and in the present case through D2; and (d) the fifth factor — D1 was negligent in the performance of its function of rendering proper emergency and treatment of the plaintiff. As such, it was clear that D1 had assumed a non-delegable duty of care that it owed personally to the plaintiff, a patient that was admitted for its services. The plaintiff was indeed in a vulnerable position and was totally reliant on the defendants for her care and treatment (see paras 39–41).

(3) The court found that D2 had breached his duty of care to provide advice and information when he had failed to advise the plaintiff and her father of the risk of suffering a median nerve injury. In terms of the expert evidence, the court was inclined to the evidence given by Prof Dr Jamari, supported by the plaintiff's expert witness on liability, Dr Mohamed Faizal bin Hj Sikkandar, in regards to the findings of Prof Dr Jamari that 'part of the nerve was cut' (total transection of the median nerve with a 5cm nerve gap). In this regard, the court was of the view that the expert opinion given by Prof Dr Jamari was reasonable, respectable and responsible and stood up to logical analysis. On balance of probabilities, the court found that the median nerve had been negligently cut during the operation undertaken on 23 January 2018 and that there was a delay in identifying the cut injury and providing corrective treatment. It was indisputable that the median nerve cut injury was caused or materially contributed by the negligence of the defendants (see paras 47 & 49–51).

(4) In relation to indemnity or notice claiming contribution ('encl 9'), the court was guided by the case of *Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd* [2024] 3 MLJ 66 in which the Federal Court held that: '... it flies in the face of the earlier findings that the respondent owes a non-delegable duty of care and it remains liable regardless to whom it may have employed or

engaged to carry out that duty of care.' As such, encl 9 was dismissed by the court (see paras 55–56).

(5) The plaintiff was entitled to recover the damages reasonably incurred provided that it could be shown that the loss and damage was either caused or materially contributed by the negligence of the defendants and each of them. In the present case, it was indisputable that the median nerve cut injury was caused or materially contributed by the negligence of the defendants (see paras 57–58).

[Bahasa Malaysia summary

Plaintif telah memfailkan tindakan terhadap defendan pertama, sebuah hospital swasta ('D1') kerana melanggar kewajipan berjaga-jaga yang tidak boleh diwakilkan dan berhujah bahawa D1 bertanggungjawab secara vikarius bagi kecuaian defendan kedua, Pakar Perunding Ortopedik dan Pakar Bedah Trauma yang berkhidmat di D1 ('D2'), yang telah secara cuai mencederakan saraf median kanan plaintif semasa pembedahan dan lewat dalam memberikan rawatan pembedahan dan perubatan yang sewajarnya bagi merawat komplikasi kecederaan saraf median tersebut. Bagi menyokong kesnya, plaintif bergantung kepada keterangan Prof Dr Jamari, pakar bedah tangan dan mikro di Pusat Pakar Universiti Kebangsaan Malaysia, yang memberi keterangan bahawa sebahagian sarafnya telah terpotong. Plaintif menuntut ganti rugi am, ganti rugi khas, faedah dan kos berkenaan dengan kecederaan dan kerugian yang dialaminya. Berikutan tindakan plaintif, D1 telah memfailkan notis untuk caruman dan indemniti ('lampiran 9') terhadap D2 sekiranya mahkamah mendapati D1 bertanggungjawab akibat daripada kecuaian D2. Isu-isu yang timbul dalam kes semasa ialah sama ada defendan-defendan telah melanggar kewajipan berjaga-jaga/*standard* berjaga-jaga mereka termasuk pelanggaran kewajipan berjaga-jaga yang tidak boleh diwakilkan dan sama ada pelanggaran tersebut telah menyebabkan kerosakan dan kecederaan seperti yang didakwa oleh plaintif.

Diputuskan, membenarkan tuntutan plaintif dan menolak lampiran 9 dengan kos:

(1) Sudah menjadi kelaziman bahawa menurut ss 101 dan 102 Akta Keterangan 1950, plaintif bertanggungjawab untuk membuktikan unsur-unsur kecuaian untuk menjayakan tuntutannya terhadap defendan-defendan. Dalam tuntutan tort kecuaian, plaintif perlu membuktikan bahawa defendan-defendan mempunyai kewajipan berjaga-jaga, kewajipan tersebut telah dilanggar dan mengakibatkan kerosakan kepada plaintif. Oleh itu, bebanan terletak pada plaintif untuk membuktikan atas imbangan kebarangkalian, bahawa defendan-defendan atau mana-mana defendan telah melakukan perbuatan kecuaian. Plaintif juga perlu membuktikan hubungan sebab-musabab antara perbuatan kecuaian dan kecederaan yang dialami

A oleh plaintif (lihat perenggan 32–33 & 35).

(2) Berkenaan kewajipan berjaga-jaga yang tidak boleh diwakilkan oleh seseorang yang menyediakan perkhidmatan, sama ada sebagai majikan atau sebaliknya, mahkamah dalam kes *Woodland v Essex County Council* [2014] 1 All ER 482 telah menyediakan lima ciri penentu. Dalam saman semasa, mahkamah mendapati bahawa lima ciri penentu tersebut telah dipenuhi seperti berikut: (a) faktor pertama — plaintif sedang menerima rawatan, oleh itu, plaintif adalah seorang pesakit; (b) faktor kedua — terdapat hubungan anteseden antara plaintif dan D1; (c) faktor ketiga dan faktor keempat — plaintif tidak mempunyai kawalan ke atas cara D1 memilih untuk melaksanakan kewajipannya, sama ada secara peribadi atau melalui pekerja atau pihak ketiga dan dalam kes ini melalui D2; dan (d) faktor kelima — D1 cuai dalam melaksanakan fungsinya untuk memberikan rawatan kecemasan yang sewajarnya ke atas plaintif. Oleh itu, adalah jelas bahawa D1 telah memikul kewajipan berjaga-jaga yang tidak boleh diwakilkan yang ia terhutang secara peribadi kepada plaintif, seorang pesakit yang telah mendapatkan perkhidmatannya. Plaintif sememangnya berada dalam kedudukan yang terdedah dan bergantung sepenuhnya kepada defendan-defendan untuk penjagaan dan rawatannya (lihat perenggan 39–41).

(3) Mahkamah mendapati bahawa D2 telah melanggar kewajipannya untuk memberi nasihat dan maklumat apabila dia gagal menasihati plaintif dan bapanya tentang risiko mengalami kecederaan saraf median. Dari segi keterangan pakar, mahkamah cenderung kepada keterangan yang diberikan oleh Prof Dr Jamari, yang disokong oleh saksi pakar plaintif berkaitan liabiliti, Dr Mohamed Faizal bin Hj Sikkandar, berhubung penemuan Prof Dr Jamari bahawa 'sebahagian saraf telah dipotong' (transeksi total saraf median dengan jurang saraf 5cm). Sehubungan itu, mahkamah berpendapat pendapat pakar yang diberikan oleh Prof Dr Jamari adalah munasabah, dihormati dan bertanggungjawab serta berpegang kepada analisis logik. Di atas imbangan kebarangkalian, mahkamah mendapati saraf median tersebut telah dipotong secara cuai semasa pembedahan yang dijalankan pada 23 Januari 2018 dan terdapat kelewatan dalam mengenal pasti kecederaan luka potongan tersebut dan menyediakan rawatan pembetulan. Tidak dapat dipertikaikan bahawa kecederaan luka potongan saraf median tersebut disebabkan atau disumbangkan secara material oleh kecuaian defendan-defendan (lihat perenggan 47 & 49–51).

I (4) Berhubung dengan indemniti atau notis menuntut sumbangan ('lampiran 9'), mahkamah berpandukan kes *Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd* [2024] 3 MLJ 66 di mana Mahkamah Persekutuan memutuskan bahawa: '… it flies in the face of the earlier findings that the

respondent owes a non-delegable duty of care and it remains liable regardless to whom it may have employed or engaged to carry out that duty of care.' Oleh itu, lampiran 9 telah ditolak oleh mahkamah (lihat perenggan 55–56).

(5) Plaintif berhak untuk mendapatkan semula ganti rugi yang secara munasabahnya ditanggung dengan syarat plaintif boleh menunjukkan bahawa kerugian dan kerosakan tersebut sama ada disebabkan atau disumbangkan secara material oleh kecuaian defendan-defendan dan setiap daripada mereka. Dalam kes semasa, tidak dapat dipertikaikan bahawa kecederaan luka potongan saraf median tersebut disebabkan atau disumbangkan secara material oleh kecuaian defendan-defendan (lihat perenggan 57–58).]

Cases referred to

Aznor Hassan bin Zakariah v Dr Khairul Nizam bin Rozali & Anor (Civil Suit No WA-22NCVC-124–03 of 2018) (unreported), HC (refd)

Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771, HL (folld)

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234, SC (refd)

Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd [2014] 4 MLJ 465; [2014] 4 MLRA 397; [2014] 6 CLJ 269; [2014] 4 AMR 301, FC (refd)

Devarani a/p Vijiyan v Dr Daniel Foo Yong Chiang dan satu lagi [2017] MLJU 2444, HC (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685, FC (refd)

Hasniyati bt Hassan & Anor v Kerajaan Malaysia [2022] 10 MLJ 469, HC (refd)

Hawkins v New Mendip Engineering Ltd [1966] 3 All ER 228, CA (refd)

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016] 2 CLJ 885, FC (refd)

Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031, SC (refd)

Muthu a/l Subramaniam v Dr Wan Hazmy Che Hon [2018] MLJU 1567; [2018] MLRHU 1291, HC (refd)

Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)

Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor [2016] 3 MLJ 742; [2016] 5 MLRA 67; [2016] 6 CLJ 225; [2016] 3 AMR 625, CA (refd)

Siow Ching Yee (suing through his wife and litigation representative, Chau Wai

Kin) v Columbia Asia Sdn Bhd [2024] 3 MLJ 66; [2024] 3 MLRA 204, FC (folld)
Tenaga Nasional Berhad v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673; [1995] 3 MLRH 196; [1995] 4 CLJ 670, HC (refd)
Woodland v Essex County Council [2014] 1 All ER 482, SC (refd)
Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 2 MLJ 1, FC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438, FC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(1)(a)
Evidence Act 1950 s 101
Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 reg 11, 11(4), Part III
Rules of Court 2012 O 40A

MS Dhillon (Navpreet Kaur with him) (P S Ranjan & Co) for the plaintiff.
Aw Ee Va (Chan Ban Eng & Co) for the first defendant.
P Sathiesh (Law Chambers of Vin Sa & Ian) for the second defendant.

Suzana Muhamad Said JC:

INTRODUCTION

[1] Nurul Iman ('plaintiff') is suing the first defendant, Gleneagles Hospital Kuala Lumpur Sdn Bhd ('D1') for breach of non-delegable duty of care and vicariously liable for the negligence of the second defendant ('D2') who had negligently injured her right median nerve during an operation and had delayed in providing necessary surgical and medical treatment to treat the complications of the median nerve injury.

[2] The plaintiff claims general damages, special damages, interest and costs in respect of the injuries and losses suffered.

[3] At the end of the trial, this court allowed the plaintiff's claim as deliberated.

BRIEF FACTS

[4] The brief facts were gathered from the pleadings and parties' submissions.

[5] The plaintiff was born on 26 November 2001 and at the time of the

alleged negligence, was 17 years old and a student.

[6] D1 is a company incorporated in Malaysia which owns and manages a private hospital known as 'Gleneagles Hospital Kuala Lumpur'.

[7] D2 is a Consultant Orthopaedic and Trauma Surgeon practicing at D1.

[8] The plaintiff was a patient of the defendants.

[9] The plaintiff suffered pain and persistent numbness of her right hand since before December 2017, and was diagnosed to have right carpal tunnel syndrome.

[10] The plaintiff was seen by D2 at D1 and was advised to undergo surgery to address her carpal tunnel syndrome so as to improve the function of her right hand. D2 had advised the plaintiff that the surgery would be a minor surgery.

[11] D2 undertook the surgery on the plaintiff at D1 on or around January 2018 ('first surgery'). Following the first surgery, the plaintiff experienced more pain at her right hand than before the surgery.

[12] The plaintiff continued to experience this pain during various follow-up visits following the first surgery. D2 advised the plaintiff to undergo a second surgery, which was carried out on or around June 2018 ('second surgery').

[13] Following the second surgery, the plaintiff experienced even more pain than after the first surgery, and did not have any feeling in three of her fingers.

[14] The plaintiff underwent follow-up and weekly physiotherapy at D1 for about two months, but still experienced the pain in her right hand. The plaintiff subsequently went to Subang Jaya Medical Centre and was seen by Dr Lau Tze Hau, who carried out tests on the plaintiff who later informed the plaintiff that the problems she faced in respect of her three fingers were as a result of problems with her median nerve, and advised corrective surgery.

[15] The plaintiff subsequently underwent corrective surgery which was carried out on 8 April 2019 by Dr Jamari bin Sapuan, a hand and micro surgeon at Universiti Kebangsaan Malaysia Specialist Centre ('UKMSC').

[16] Following the corrective surgery, Dr Jamari advised the plaintiff that he discovered that around five centimetres of the plaintiff's median nerve had been resected.

[17] Dr Jamari advised further corrective surgery, which was undertaken on 16 April 2019. During this surgery, a left sural graft was used as a cable graft to repair the 5cm loss of the median nerve.

[18] Another corrective surgery was undertaken by Dr Jamari in March 2021.

[19] Notwithstanding the corrective surgeries, the plaintiff continues to suffer from median nerve palsy and is unable to properly utilise her right hand to carry out activities of daily living.

[20] The plaintiff avers that her median nerve had been resected during surgery carried out by D2 and claims relief against the defendants for negligence and breach of contractual, statutory and other duties, including of candour and good faith and to act in the best interests of the plaintiff, which caused or materially contributed to the loss and damage suffered by the plaintiff.

[21] Apart from the negligence contention, the plaintiff contended that the defendants had failed to obtain her informed consent and that she was not advised of the risks and complications of the carpal tunnel release operation.

[22] The plaintiff had also contended that D2 had negligently injured her right median nerve during the operation and had delayed in providing necessary surgical and medical treatment to treat the complications and sequalae of the median nerve injury.

[23] As a result, the plaintiff suffered a serious and irreversible nerve injury to her right hand and will need lifelong physiotherapy, pain relief medicines, psychiatric treatment and assistance in daily living whenever she needs to use her right hand.

[24] D1 denies all particulars of breach of duties and/or negligence.

[25] D1 had also filed a notice for contribution and indemnity (encl 9) against D2 in the event D1 is found liable as a result of D2's negligence. D1 seeks a contribution and/or indemnity to the full extent against D2 pursuant to common law, contract and/or the provisions under the Civil Law Act 1956.

[26] D2 denies the plaintiff's claim. In his defence, he stated that he has acted in the best interest of his patients including the plaintiff and has provided sufficient information and advice on the condition of the plaintiff.

[27] During the trial, the plaintiff had demonstrated to the court the difficulties that she faced in using her right hand.

[28] In gist, the plaintiff's case is as follows:

Clinical facts:

(a) the plaintiff had at first complained of pain in her left hand;

(b) D2 had attended to her and advised her to undergo surgical removal of ganglions in her left hand. The plaintiff has no complaint regarding that operation;

(c) the plaintiff had on 19 January 2018 consulted D2 and complained of pain, swelling and numbness over her right wrist;

(d) D2 advised her that she had a ganglion cyst and advised her to undergo surgical removal of the ganglion cyst and undergo 'prophylactic carpal tunnel release';

(e) the plaintiff was, however, advised that she had developed carpal tunnel syndrome and not that she was at risk of developing carpal tunnel syndrome;

(f) a prophylactic operation would have been necessary only if she was at risk of developing the syndrome. The consent taken for the operation was for 'carpal tunnel release and excise of ganglion @ right hand/wrist';

(g) D2's pleaded case that he had undertaken prophylactic carpal tunnel release was inconsistent with his evidence at trial that the plaintiff had suffered carpal tunnel syndrome; and

(h) complications and risks of the operation were not mentioned in the consent form and were not recorded in the medical records.

THE TRIAL

[29] During trial, parties called the following witnesses:

PW1	Dr Mohamed Faizal bin Hj Sikkandar ('Dr Faizal')	Plaintiff's expert witness on liability
PW2	Dr Lydia (Consultant Rehabilitation Physician)	Plaintiff's expert witness on quantum
PW3	Dr Siti Nur Zahirah Jailani (Medical Officer)	Subpoena witness of fact
PW4	Abu Mansor (plaintiff's father)	Witness of fact
PW5	Prof Dr Jamari	Subpoena witness of fact
PW6	Nurul Iman	Plaintiff

PW1	Dr Mohamed Faizal bin Hj Sikkandar ('Dr Faizal')	Plaintiff's expert witness on liability
DW1	Dato' Dr Sivananthan a/l Shanmugam (Consultant Orthopaedic and Trauma Surgeon)	D2's expert witness on liability and quantum
DW2	Dato' Sri Zulkharnain Ismail	D2
DW3	Dr Sundar Raj a/l Silvaraja	D1's representative

[30] There were four expert reports filed by way of an affidavit under O 40A of the Rules of Court 2012 ('the ROC 2012') as follows:

(a) the plaintiff's expert report:

(i) expert report on liability of Dr Mohamed Faizal bin Hj Sikkandar; and

(ii) expert report on quantum of Datin Dr Lydia Abdul Latif.

(b) D2's expert report:

(i) expert report on liability of Dato' Dr KS Sivananthan; and

(ii) expert report on quantum of Dato' Dr KS Sivananthan.

ISSUES

[31] This court finds that the central issue in this case is whether the defendants had breached their duty of care/standard of care including breach of non-delegable duty of care and whether such breach had caused damage and injuries as alleged by the plaintiff.

ANALYSIS AND FINDINGS

Liability

Burden of proof

[32] It is trite that the onus lies on the plaintiff to prove the elements of negligence in order to succeed in her claim against the defendants pursuant to ss 101 and 102 of the Evidence Act 1950 (see *Datuk Mohd Ali bin Hj Abdul Majid & Anor (both practising as Messrs Mohd Ali & Co) v Public Bank Bhd* [2014] 4 MLJ 465; [2014] 4 MLRA 397; [2014] 6 CLJ 269; [2014] 4 AMR 301 and *Tenaga Nasional Berhad v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673; [1995] 3 MLRH 196; [1995] 4 CLJ 670).

[33] In a claim for tort of negligence, the plaintiff must prove that the defendants owe a duty of care, that duty was breached and caused damage to the plaintiff. The Court of Appeal case of *Shalini a/p Kanagaratnam v Pusat*

Perubatan Universiti Malaya (formerly known as University Hospital) & Anor [2016] 3 MLJ 742; [2016] 5 MLRA 67; [2016] 6 CLJ 225; [2016] 3 AMR 625, enunciated the four elements that a plaintiff has to prove in cases of medical negligence:

> [9] In cases of professional negligence and/or medical negligence, the plaintiff has to prove four elements. They are: (a) duty of care; (b) breach of standard of care; (c) breach of duty of care; (d) caused damages. In consequence, the plaintiff has to lead evidence to show the standard of care has been breached. The doctrine of res ipsa loquitur will not ordinarily apply as the plaintiff will have to discharge the legal burden and only after the legal burden has been discharged, the defendant has to satisfy that legal duty was not breached.

[34] Further, in the case of *Muthu a/l Subramaniam v Dr Wan Hazmy Che Hon* [2018] MLJU 1567; [2018] MLRHU 1291 Justice Abu Bakar Jais (now FCJ) held that the burden to prove negligence lies on the plaintiff and it is not the obligation of the defendant to disprove the allegations of negligence and held:

> [34] It is trite that the burden of proof in cases of medical negligence such as this is on the plaintiff. It is the plaintiff's burden to prove negligence against the FD on the basis that what was done was what a reasonably competent practitioner skilled in that particular act would or would not have done. The FD has no obligation to disprove the allegations of negligence in the statement of claim (see the cases *Wu Siew Yong v Pulau Pinang Clinic Sdn Bhd & Anor* [2011] 3 MLJ 506; [2010] 1 MLRH 956; [2011] 1 CLJ 229, *Mathew Scott Oakley & Ors v Dr George Varughese Anor, Dr Raja Kumar Rajendran* [2009] MLJU 1429; [2009] 5 MLRH 93; [2010] 10 CLJ 322 and *Payremalu a/l Veerappan v Dr Amarjeet Kaur & Ors* [2001] 3 MLJ 725; [2001] 2 MLRH 101; [2001] 4 CLJ 380).

[35] Thus, the burden lies on the plaintiff to prove on balance of probabilities, that the defendants or any of the defendants had committed the act of negligence. It must also be proven by the plaintiff the causation link between the act of negligence and the injuries suffered by the plaintiff.

Liability of D1

[36] The core business of D1 can only be rendered through healthcare professionals such as D2, the medical officer and the nurses. In the instant suit, under such circumstances, D1 owes a duty of care to the clients or patients with whom D1 accepts and agrees to provide healthcare.

[37] In reg 11(4) of the Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 (PU(A) 138/2006) under Part III — Organization and Management of Private Healthcare Facilities or Services, a doctor is part of the organisation of the

hospital. Regulation 11 provides:

> Regulation 11 Plan of organization.
>
> (1) All private healthcare facilities or services shall have a plan of organization, which shall include an organizational chart that shall be exhibited in a conspicuous part of the private healthcare facilities or services.
>
> (2) The plan of organization shall be in writing and made available upon inspection.
>
> (3) The plan of organization shall specify the authority, responsibility, and functions of each category of staff.
>
> (4) *All registered medical practitioners or registered dental practitioners privileged to practise in the private healthcare facilities or services shall be considered as part of the organization.*
>
> (5) Any person who contravenes sub-regulation (1) commits an offence. (Emphasis added).

[38] In *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685, the Federal Court had rejected the argument that private hospitals are mere providers of facilities and not medical treatment. The Federal Court held:

> [59] We were also referred to reg 14(1) of the Regulations, which provides that:
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> A patient admitted in a private healthcare facility or service shall be under:
>
> (a) the professional care or treatment of a registered medical practitioner while a patient admitted for dental care or treatment shall be under the professional care or treatment of a registered dental practitioner; and
>
> (b) the direct care or treatment of a healthcare professional.
>
> [60] This is preceded by reg 11(4) of the Regulations, which reads:
>
> All registered medical practitioners or registered dental practitioners privileged to practise in the private healthcare facilities or services shall be considered as part of the organization.
>
> [61] Read in their entirety, we do not consider that the relevant legislation warrants the interpretation that private hospitals are mere providers of facilities and not medical treatment. On the contrary, the legislative scheme clearly envisages that the function of private hospitals includes generally the 'treatment and care of persons who require medical treatment or suffer from any disease', and considers the services of medical practitioners as part of that function. The notion that the duty of a hospital is confined only to its facilities and staff selection has long been rejected in the common law. Such a notion is also incongruent with societal expectations of private hospitals as healthcare service providers; most patients do not perceive hospitals as providers of all the utilities and backup services except medical

treatment. Adopting Lord Greene's formulation, it is precisely medical treatment that patients expect when they knock on the door of the hospital.

[39] Regarding the non-delegable duty of care of a person providing services, whether as an employer or otherwise, in *Woodland v Essex County Council* [2014] 1 All ER 482, it was held:

> [23] Recognising the principle of non-delegable duty as expounded by Lord Greene in *Gold v Essex County Council* [1942] 2 KB 293 and Denning LJ in *Cassidy v Ministry of Health* [1951] 2 KB 343, Lord Sumption identified five defining features of the second category in a passage reproduced in full below: If the highway and hazard cases are put to one side, the remaining cases are characterised by the following defining features:
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> (1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.
>
> (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,
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> (i) which places the claimant in the actual custody, charge or care of the defendant, and
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> (ii) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of school children.
>
> (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.
>
> (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.
>
> (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

[40] *Woodland* was also referred by the Federal Court in *Siow Ching Yee (suing through his wife and litigation representative, Chau Wai Kin) v Columbia Asia Sdn Bhd* [2024] 3 MLJ 66; [2024] 3 MLRA 204. This court finds that the five defining features in *Woodland* are fulfilled in this suit:

(a) the first factor:
'patient' must include anyone receiving treatment. The plaintiff is receiving treatment and a patient;

(b) the second factor:
an antecedent relationship between the plaintiff and D1;

(c) the third and fourth factor:
the plaintiff had no control over how D1 chose to perform its obligations, whether personally or through employees or third parties and in this case through D2. D1 as a provider of healthcare for the performance of its duty of care, had delegated to D2, who in turn was negligent in the performance of what was his, and also essentially D1's, duty; and

(d) the fifth factor:
D1 was negligent in the performance of its function of rendering proper emergency and treatment of the plaintiff.

[41] With all the five factors satisfied, it is clear that D1 had assumed a non-delegable duty of care that it owed personally to the plaintiff, a patient that was admitted for its services. The plaintiff is indeed in a vulnerable position and is totally reliant on the defendants for her care and treatment.

Liability of D2

[42] The expert evidence given by D2's witness, shown that the median nerve had been cut during the operation undertaken by D2 on 23 January 2018.

[43] The plaintiff contended that D2 pleaded 'prophylactic carpal tunnel release' but had advised the plaintiff and her father that she had developed carpal tunnel syndrome and needed an operation to treat the same.

[44] 'Prophylactic' means 'pertaining to the prevention of the development of a disease'. In this context it means that the plaintiff had yet to develop carpal tunnel syndrome (*Butterworth Medical Dictionary,* (2nd Ed) 1978).

No record of advised risk/informed consent

[45] In *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031 it was held that 'The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments'.

[46] *Montgomery* was also applied by the Federal Court in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438.

[47] D2 had breached his duty of care to provide advice and information when he had failed to advise the plaintiff and her father of the risk of suffering a median nerve injury.

[48] The plaintiff contended that the complications and risks of the operation were not mentioned in the consent form and were not recorded anywhere in the medical records. Accordingly, the plaintiff and her father had testified that they were told that it was a simple operation and that no risks were mentioned to them.

[49] In terms of the expert evidence, this court is inclined to the evidence given by Prof Dr Jamari, supported by Dr Faizal, in regards to the findings of Prof Dr Jamari that 'part of the nerve was cut' (total transection of the median nerve with a 5cm nerve gap).

[50] Applying *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771, this court is of the view that the expert opinion given by Prof Dr Jamari is reasonable, respectable and responsible and stands up to logical analysis.

[51] On balance of probabilities, this court finds that the median nerve had been negligently cut during the operation undertaken on 23 January 2018 and that there was a delay in identifying the cut injury and providing corrective treatment. It is indisputable that the median nerve cut injury was caused or materially contributed by the negligence of the defendants.

[52] This can be seen from the medical evidence, including the expert evidence of D2, which show that the median nerve had been cut during the operation undertaken by the second defendant on 23 January 2018.

[53] Furthermore, D2's expert, had properly conceded, that weight should be given to the findings made by Professor Dr Jamari bin Sapuan when he operated on the plaintiff on 8 April 2019.

[54] Apart from negligence and breach of contract, there is the tort of breach of statutory duty, a duty owed directly by the defendants. Statutory duties regarding safety created for, instance, in such fields as employment and now in healthcare, exist for the public benefit (*Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234 (SC)).

[55] In terms of indemnity or notice claiming contribution (encl 9), this court is guided by the case of *Siow Ching Yee*. Thus, encl 9 is dismissed accordingly. In *Siow Ching Yee*, the Federal Court held:

> [94] Finally, a note on indemnity. The respondent has invited this court to order that the second defendant indemnify the respondent in the event that it is found liable. I do not find this to be right or available in law.
>
> [95] First, the second defendant is not a party to this appeal. *More importantly, it flies in the face of the earlier findings that the respondent owes a non-delegable duty of care and it remains liable regardless to whom it may have employed or engaged to carry out that duty of care*. The principle imposes a personal liability on the respondent, over and above that against the tortfeasor. ... (Emphasis added).

CONCLUSION

[56] Accordingly, on balance of probabilities, this court finds that the plaintiff has succeeded to prove her case. This court is satisfied that the defendants are liable based on the above deliberations. Consequently, encl 9 is also dismissed with cost.

QUANTUM

[57] The plaintiff is entitled to recover the damages reasonably incurred provided that it can be shown that the loss and damage was either caused or materially contributed by the negligence of the defendants and each of them (see *Wu Siew Ying t/a Fuh Lin Bud-Grafting Centre v Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 2 MLJ 1).

[58] It is indisputable that the median nerve cut injury was caused or materially contributed by the negligence of the defendants.

[59] The plaintiff was 17 years old when she suffered catastrophic injuries to her right hand. Since 2017, the plaintiff has had to undergo a total of eight operations on her right hand, including two at D1 and six further operations at UKMSC.

[60] The trauma and disabilities had also caused the plaintiff to suffer psychiatric injury. She had to engage in self-help and had sought treatment at UKMSC where Professor Dr Jamari had diagnosed the cut injury to her right median nerve and undertook surgical and medical treatment over a period of four years and two months.

[61] She is now 22 years old. As a result of the negligence of the defendants, the plaintiff is unable to use her right hand which is her dominant right hand. She has difficulties in doing activities requiring right hand and bimanual hand

function. She needs assistance in her daily living activities.

[62] Therefore, the plaintiff seeks the sum of RM175,000 as general damages for pain and suffering and loss of amenities of life including for the additional six operations that she had to undergo over a period of four years and two months, general damages for psychiatric injuries of RM75,000 and aggravated damages of RM300,000. Hence, the plaintiff submitted the following cases:

(a) *Aznor Hassan bin Zakariah v Dr Khairul Nizam bin Rozali & Anor* in Kuala Lumpur High Court (Civil Suit No WA-22NCVC-124–03 of 2018) (unreported): the High Court awarded the sum of RM 250,000 as general damages for pain and suffering and loss of amenities of life the negligence of the orthopaedic surgeon defendant in delaying the initial surgery and the insufficient treatment undertaken to clear the infection led to the plaintiff suffering osteomyelitis at his fractured right leg. The plaintiff underwent six surgical procedures before making a reasonable recovery;

(b) *Devarani a/p Vijiyan v Dr Daniel Foo Yong Chiang dan satu lagi* [2017] MLJU 2444: the High Court awarded the sum of *RM 300,000* as general damages for pain and suffering and loss of amenities of life to a young plaintiff who had suffered infection to her arm following a negligent surgery to correct a fracture at her elbow. The prolonged infection resulted in a deformity of her elbow; and

(c) *Hasniyati bt Hassan & Anor v Kerajaan Malaysia* [2022] 10 MLJ 469: the High Court awarded the sum of RM 350,000 as general damages for pain and suffering and loss of amenities of life to a four year old plaintiff who had suffered auto-amputation of his right arm (above the elbow) at day 52 of life. The plaintiff who was born prematurely at 27 weeks of gestation required intravenous fluids in the NICU. The admitted negligence of the nurses in failing to remove the IV line which was blocked, led to the arm becoming gangrenous.

Aggravated damages

[63] In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784, the Court of Appeal held:

> Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest or personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

Future general damages

[64] The award for future general damages takes into account the pain and suffering endured by the plaintiff which she will continue to suffer as a result of her injuries for the rest of her life including the loss of the amenities of life which refers to the plaintiff's inability to lead a normal lifestyle and to undertake the simplest of things in life.

[65] In *Hawkins v New Mendip Engineering Ltd* [1966] 3 All ER 228 (CA), it was held:

> The problem in this case is to forecast what is likely to happen in the future. For it has now transpired as the result of medical examination, and as a result of the analysis by doctors of certain symptoms which this young man subsequently developed, that *he is at present suffering from what is called temporal lobe epilepsy*. That is, as I understand it, a relatively minor form of epilepsy, *but there is a risk (and a serious risk) that at some time in the future, necessarily an uncertain future time, this young man may develop major epilepsy*. If he did so, of course, it would necessarily alter the whole tenor of his life. It might affect his ability to earn his living, at any rate in doing any such job as he is doing at present, and inevitably it would grievously affect his social and domestic life and everything that goes to make up the amenities of life. The doctors in their evidence were unanimously of the view that in a case of this sort it is virtually impossible to tell within the first five years of the accident what the future is likely to be. The position, therefore, was that the learned judge had the difficult, and one might say the almost impossible, task of putting into pounds, shillings and pence what might be the effect of a wholly uncertain future. *That is the result of our procedure, which requires the court to award a sum of damages now, once-and-for-all, which is sufficient to take care of likely future possibilities. It was in those circumstances that the learned judge came to award this very considerable sum of £8,000 for general damages.* (Emphasis added).
>
> ...
>
> ... I agree, and I agree with the reasoning of Willmer LJ's judgment. In my opinion, *if the learned judge had awarded any appreciably smaller sum in this case, he would have been taking an unjustifiable gamble with the future of this young man* (Emphasis added).

[66] *Hawkins* was also referred to in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885 where the Federal Court held:

> with the above proposition, we are of the view that the standard of proof with regard to the assessment of future loss or damage is on the *balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future*. From the authorities, one can say that such a lower degree to be attached is best termed by the word *'possibility', 'chance', 'risk', 'danger' or 'likelihood' of the future damage is still, in our opinion, on a balance of probabilities.* (Emphasis added).

[67] Therefore, the standard of proof of future damage is on the balance of probabilities, but with a lower degree of certainty which can be described as a 'possibility', 'chance', 'risk', 'danger' or 'likelihood'.

Cost of adaptive aids

[68] Based on the facts and evidence, the plaintiff is unable to use her right hand to write, eat, cook and dress. She had also given up on her favourite hobbies such as playing the guitar and badminton due to her injuries.

[69] Dr Lydia ('PW2') had recommended certain adaptive aids to assist the plaintiff with her daily activities. These items will aid the plaintiff with her right-hand motor function. She is unable to grip and optimise her right hand as explained by Dr Lydia.

Hospital and medical expenses

[70] The hospital and medical expenses were paid by the plaintiff's father's employer. *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685, had decided that the medical expenses paid by a third party, for example, an insurer or an employer, can be recovered by the plaintiff.

[71] Furthermore, s 28A(1)(a) of the Civil Law Act 1956 provides:

> 28A (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
>
> (b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or
>
> (c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

CONCLUSION

[72] A summary of the award of this court is as reflected in the table below:

ANNEXURE 1

TABLE OF DAMAGES, COSTS AND INTERESTS AWARDED

Item	Award of the court (RM)
General damages	
General damages for pain and suffering and loss of amenities of life;	175,000
General damages for psychiatric injuries;	75,000
Aggravated damages;	300,000
Sub-total	550,000
Life expectancy of the plaintiff	74 years old
Multiplier	52
Future general damages	
the cost of splints;	Global sum of 2,200
the cost of adaptive aids, namely;	
ergonomic keyboards;	4,400
ergonomic mouse;	3,300
writing aids;	1,800
jar opener for weak hand;	1,600
semilunar knife;	1,600
enlarge holder-tubing; and	1,600
pump container	1,600
the cost of medicines, investigations and consultations;	
Pregablin;	93,600
Paracetamol;	18,720
medical consultation; and	11,340 (RM105 x four times a year for the first two years, then RM105 for twice a year for 50 years)
medical investigation	9,720 (RM180 every six months for two years then as needed)
the cost of rehabilitation;	
physiotherapy;	11,520 (RM160 per visit, 24 visits a year for three years)
occupational therapy; and	23,040 (RM160 per visit, 48 visits a year for three years)

Item	Award of the court (RM)
clinical psychologist consultation	1,080 (RM180 per visit x six sessions)
the cost of future travel expenses;	8,400(RM140 per month for five years)
the value of care and services provided by family members	187,200 (RM300 per month for 52 years)
the cost of future tendon transfer surgery	30,000
Sub-Total	412,720
Hospital and medical expenses;	99,253.93
Travel expenses;	5,000 (RM140 per month for three years)
the cost of pre-action discovery;	10,000
the loss of earning capacity;	20,000
Sub-Total	134,253.93
Travel expenses;	1,000
Value of care provided by family members;	9,000 (RM500 per month)
Sub-Total	10,000
Grand-Total	1,106,973.93
Costs	
out-of-pocket expenses;	22,282.15
party and party costs;	150,000
Interest	
interest on special damages from the date of incident, 23 January 2018 to the date of judgment;	4%
interest on pre-trial damages, general damages for pain and suffering and loss of amenities of life and psychiatric injuries and aggravated damages from the date of service of writ, 22 August 2022 to the date of judgment; and	5%
interest on the judgment sum including costs and pre-judgment interest, from the date of judgment to the date of full payment.	5%

Plaintiff's claim allowed; encl 9 dismissed with cost.

Reported by Dzulqarnain Ab Fatar